

Your Guide to Just Compensation



What to do when the
Government wants to
acquire your land



State of Utah
Office of the Property
Rights Ombudsman

Your Right to Just Compensation:

*What to Do When the
Government Wants to
Acquire Your Land*

State of Utah Department of Commerce

Office of the Property Rights Ombudsman
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

Mailing Address:
Office of the Property Rights Ombudsman
PO Box 146702
Salt Lake City, UT 84114

801-530-6391
TOLL FREE 1-877-882-4662
(1-877-UTAH OMB)
Fax: 801-530-6338

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DISCLAIMER:

The views, opinions, statements and legal conclusions contained in this publication are those of the authors, and do not represent official statements or opinions of the State of Utah or the Utah Department of Commerce. Any errors or misstatements in this publication are solely those of the authors.

We appreciate the assistance of H. Craig Hall, one of the most senior city attorneys in the State, who prepared the initial drafts of the materials in this booklet. Changes have been made over time, so he is not responsible for all of the conclusions stated here. The initial revisions have been made by Craig M. Call, the former Lead Attorney in the Utah Office of the Property Rights Ombudsman. Subsequent and ongoing revisions have been made by the legal staff of the Utah Office of the Property Rights Ombudsman.

By delivering this notice to property owners as soon as practical in the negotiation process, government and utility officials involved in the acquisition of property will comply with an express duty to provide property owners and displaced persons with the important disclosures as required by Utah Code Annotated Section 78-34-4.5.

- IMPORTANT DISCLOSURES -

ORAL REPRESENTATIONS OR PROMISES MADE DURING THE NEGOTIATION PROCESS ARE NOT BINDING UPON THE PERSON SEEKING TO ACQUIRE THE PROPERTY BY EMINENT DOMAIN

While agency representatives who negotiate with property owners will try to answer questions and explain the project that is planned, they do not have the power to bind the government or company. If you as property owner are making any decisions, moving from your property, or taking any action based on what you are told, be sure to (1) get those promises or representations in writing, and (2) get them signed by someone having the authority to bind the agency or company that is acquiring your land.

FREE HELP WITH QUESTIONS AND DISPUTES

You have the **right to attempt to resolve eminent domain disputes out of court** through mediation or arbitration and to consult with the Utah Office of the Property Rights Ombudsman (“Office”). The Office is staffed by attorneys hired by the State of Utah as an independent source of information and assistance for property owners and others involved in the acquisition of property for public projects. The services offered by the Office are free. The Office can be contacted toll free at 1-877-882-4662. (1-877-UTAH OMB).

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YOUR RIGHTS AS A PROPERTY OWNER UNDER UTAH'S LAW OF EMINENT DOMAIN

Eminent Domain is the legal process that allows condemnation of private property for public use. This power by the sovereign to appropriate property and to delegate that power through legislation to others is inherent in government. The only restrictions to this power are those placed upon it by the Constitution and by the government itself.

Anciently, governments could take private property without paying for it. The framers of the U.S. Constitution recognized the sovereign's inherent right to take property for public use or purpose, but emphasized an attendant obligation that the condemnor pay "just compensation" for the property. The Fifth Amendment of the Bill of Rights states "nor shall private property be taken for public use, without just compensation." Article I, Sect. 22 of the Utah Constitution reads that "private property shall not be taken or damaged for public use without just compensation."

Both the U.S. and the Utah Constitution allow the taking of private property for public use. The Bill of Rights requires only that if your property is acquired, it must be for a "public purpose" and that the government must pay you "just compensation."

The following is a summary of your rights with respect to the acquisition of your property through eminent domain. A more detailed discussion of the law of eminent domain follows. Note that the following information applies only to eminent domain actions by entities of state and local government and utilities operating under state law. They do not apply to federal land acquisitions or interstate utilities operating under federal law.

EXECUTIVE SUMMARY OF PROPERTY OWNERS' RIGHTS

1. **Fair Market Value.** You have the constitutional right to receive “just compensation” when an agency acquires your property. Just compensation is the “fair market value” of the land or property acquired. Just compensation can also include “severance damages” — compensation for a decrease in the market value of the portion of your property that remains when only part of your property is acquired, if that decrease in value occurs because of the planned public improvements. In some cases, just compensation can also include damages caused by the project to property that is not acquired.

2. **Full Payment.** You have the right to receive payment for “just compensation” in the full amount that is determined by a court, jury, arbitration, or negotiation before the agency takes title to your property.

3. **Early Occupancy.** If the agency wishes to occupy your property before “just compensation” can be agreed upon, they may obtain the right from a court to do so. If so, you are entitled to receive the money that the agency is offering you for the acquisition of your property before they occupy it. In such cases, you may still reserve the right to have the “just compensation” determined by a court, jury, or arbitration and to receive more compensation if you are found to be entitled to more.

4. **Public Documents.** You have the right to examine and make copies of any public documents, including project maps, specifications or other project materials in the agency’s possession.

5. **Open Meetings.** You have the right to attend any meetings held by an elected or appointed council or commission to discuss the project and to tape record the proceedings. You do

not have the right to speak unless the meeting is a public hearing. You may be legally excluded if the officials move to go into an executive session to discuss the acquisition of real property or to discuss imminent legal proceedings.

6. Other Property Owners. You may request that the agency provide a list of any other property owners whose property is also being acquired for the project.

7. Public Purpose. You have the right to know the public purpose behind your property's acquisition and to challenge the necessity of the acquisition. This must be done early in the process. You are entitled to know that the project has been designed to accomplish the greatest good with the least private injury.

8. Offer and Negotiation. You have the right to negotiate with the agency before condemnation proceedings begin. For that purpose, the agency is required to provide you with a written determination of the value of the property that is to be acquired from you and of any damages that will arise as a result of the acquisition.

9. Appraiser. You have the right to accompany the appraiser hired by the agency during his or her inspection of your property and to talk to the appraiser before a value is reached.

10. Appraisal. You have the right to know the amount of the appraised value of your property and of any damages assessed and to request a copy of the appraisal report. Homeowners are entitled to a copy on request. Business and farm owners are entitled to know what appraisals exist and why they are not allowed to see them during negotiations. If the matter goes to formal mediation, arbitration or trial, you will be entitled to see the

appraisal before the hearing so that you can consider and respond to its conclusions.

11. Other Damages. You have the right to be compensated for damage to any improvements on the land such as fences, landscaping and other items attached to the land that contribute value to the property. You also have the right to be compensated for additional net lost value of any remaining property when only a portion of your property is being taken. You may also be entitled to just compensation for any special and unique damage done to any portion of your property that is not acquired for the project. The agency may also be required to pay for temporary occupancy of any portion of your property that is not acquired, but which must be used by the agency during construction of the project.

12. Relocation Costs. You may be eligible to be paid certain relocation expenses if the agency requires you to move your home, farm, or small business as a result of the condemnation. Relocation costs are determined by federal and state laws and regulations, and you must comply with the conditions imposed by those laws and regulations in order to be eligible. Tenants may also be eligible for certain relocation costs, just as owner-occupants are.

13. Replacement Dwelling. Homeowners who are displaced may be eligible under state or federal law to be offered a comparable replacement dwelling that is decent, safe and sanitary and reasonably close to your employment and public services. If the just compensation offered is not enough to pay for a suitable and comparable replacement dwelling, then additional compensation may be due.

14. **Displaced Business or Farm.** You may be eligible, if your small business or farm is displaced by the project, to receive the agency's assistance in identifying replacement properties available for sale and located within the agency's jurisdiction.

15. **Prior Notice.** Unless an emergency exists, you have the right to receive 90 days written notice before a move is required.

16. **Rollback Taxes.** You have the right to have the agency pay any greenbelt rollback taxes if condemnation results in your land losing greenbelt status.

17. **Office of the Property Rights Ombudsman.** You have the right to consult with the Office of the Property Rights Ombudsman and to inquire about your rights and responsibilities in eminent domain proceedings. The agency acquiring your property has a duty to give you the current phone number of the Office. The Office can be reached in Salt Lake City at 801-530-6391 or toll free statewide at 1-877-882-4662 (1-877-UTAH OMB).

18. **Second Appraisal.** You may be eligible to have an additional appraisal at the agency's expense, if you request it through the Office of the Property Rights Ombudsman and a mediator or arbitrator appointed by the Office determines that the second appraisal is reasonably necessary to resolve a dispute about just compensation. You may also obtain additional appraisals at your own cost for use in negotiation, arbitration, or trial.

19. **Hearing.** Before a special district, town, city, county, school district, or other unit of local govern-

ment can bring a legal action to condemn your property, the governing body of the local government entity must hold a public meeting about the need to condemn your property. You must be given advance notice of the meeting and be allowed to speak if you choose to. There is no right to a hearing if the entity acquiring your property is a private utility or a state agency such as the Utah Department of Transportation.

20. Alternative Dispute Resolution. You have the right to attempt to resolve issues just compensation outside of court. If the amount of just compensation cannot be negotiated, the agency may institute legal action against you. You have the right to request mediation or arbitration through the Office of the Property Rights Ombudsman in an attempt to resolve the matter outside of court. If the Office determines that mediation and/or arbitration is appropriate, you have the right to insist on that process even if the agency objects. The results of any arbitration held can be appealed to the district court, so it is not binding unless the parties agree to make it binding or neither side appeals a decision by the arbitrator or arbitrators. If the arbitration award is appealed, you may request a jury trial.

21. Evidence. You have the right to offer any relevant and admissible evidence at arbitration or trial, including the use of expert witnesses, to justify the amount of just compensation you consider appropriate. Any witness (other than a property owner) who testifies to property value must be a licensed appraiser.

22. Disclosure and Review. You have the right to know about and examine any evidence that will be used by the agency to establish the amount of just compensation prior to formal mediation, arbitration or trial. This

includes copies of any appraisals the agency has obtained to determine just compensation and other evidence they plan to offer.

23. Testify. As a property owner, you may testify at arbitration and/or at trial regarding the value of your property.

24. Cross Examination. You have the right at arbitration or trial to cross examine the expert witnesses that the agency relies upon in establishing the amount of just compensation that it claims to be fair. The agency can cross examine any witnesses you call as well.

25. Appeal. You have the right to appeal to state court if you are not satisfied with an arbitrator's determination.

26. Jury Trial. If the matter goes to court, even after arbitration, you have the right to choose to have the amount of compensation determined by a jury rather than by a judge. Other issues related to the condemnation action will likely be decided by a judge, and not by the jury.

27. Appellate Review. You have the right to appeal a district court decision to an appellate court, if appropriate.

Please feel free to call the Office of the Property Rights Ombudsman if you have any questions about these rights.

DEFINITION AND PURPOSE OF EMINENT DOMAIN

Under Utah law, there are a variety of purposes or reasons for which property can be acquired by eminent domain. The State, through legislation, has delegated its condemnation powers to various agencies, political subdivisions, and even private companies and individuals. These include the Utah Department of Transportation, cities, counties, special districts, redevelopment agencies, and school districts. Private corporations such as public utilities, canal, mining and lumber companies and railroads can use the power of eminent domain to acquire private property. For purposes of this booklet, all these potential condemnors will be referred to as the “Agency.”

The U.S. and Utah Constitutions basically provide two major protections to property owners: (1) the property must be acquired for a public use or purpose; and (2) the property owner must be paid “just compensation” for private property.

“Just Compensation” means that you are to be paid the “fair market value” of any property actually taken by the Agency as well as any net loss of value in the property remaining when only a portion of a larger parcel is acquired. Although that concept may appear simple, its application is sometimes very complex. Each piece of property is unique and “just compensation” must be determined on a case-by-case basis.

The term “public use” generally means that the property will be used or available for public use after it is acquired. Examples of such public uses include condemnation for roads, schools, parks, public buildings, or to eliminate a

“blighted area” and accomplish redevelopment. “Public use” does not mean that the property must be owned by a government entity. Many uses have been statutorily designated by the Utah legislature as a public use even though they appear private in nature. Property can be in private ownership after condemnation, and used for power lines and private canals, railroads, and other uses so long as the condemnation was to accomplish a “public use” as defined in statute. Incidental private benefits can result from a project that will nevertheless be considered as a “public use.”

THE CONDEMNATION PROCESS

It may be necessary in certain situations that private property be acquired for projects that improve the general welfare of the community even if the property owner refuses to sell or cannot agree with the government on the amount of just compensation to be paid. When negotiations to acquire the property fail and an agreement cannot be reached, the Agency can proceed with the eminent domain process, and file a court action to acquire the property. The property owner has the right to use an alternative dispute resolution process outside of court, if preferred, but some third-party entity will eventually determine the amount of just compensation that is to be paid if the condemnor and the property owner cannot otherwise agree.

PROJECT PLANNING—PUBLIC MEETINGS

The acquisition process begins when an Agency determines that the construction of a necessary *public* project will require the acquisition of private property and that it has the funds or funding process to acquire it.

Sometimes property owners are not notified of pending projects until the process of land acquisition begins. This is not necessarily illegal, although there are special notice requirements if your property is being considered for redevelopment, where special advance notice is given and public hearings are required.

If you become aware ahead of time of a project that may involve your property, it is in your best interest to stay informed during the planning of the project. You have the right to attend meetings held by a city council, county commission, agency board or other appointed body and there you may listen to them discuss the project. Sometimes public meetings are required to allow landowners to comment before final decisions are made. In limited cases, an Executive Session can be held to discuss the acquisition of property and you will be excluded from those meetings. If that happens, you may still be entitled to information about the closed meeting. Review Chapter 52-4 of the Utah Code (Open and Public Meetings Act) and/or call the Office of the Property Rights Ombudsman if you would like to know more about open and public meetings.

GOVERNMENT RECORDS-GRAMA

Citizens are legally entitled to access to public, non-privileged documents under the Government Records Access and Management Act or “GRAMA” (Chapter 63-2 of the Utah Code). This Act may be helpful to you in understanding the proposed project and how it will affect you and your property. If your informal requests for information are not honored and you are not given all the documents you need with an informal request, you can make a formal demand under GRAMA. GRAMA applies

only to governmental agencies, however, and not to private corporations.

You have the right to examine and make copies of maps and most other relevant materials in the possession of a government entity regarding the project and affected property. You may also request that the Agency provide a list of any other property owners whose property must be acquired for the project. While prices paid by the Agency for other properties may be of interest to you, they are generally not admissible in court to establish the value of your property since each property is unique and each owner's motives and desires may be different.

You are encouraged to contact the Agency or the Office of the Property Rights Ombudsman if you have any questions concerning your entitlement to information and records from a government condemnor. Most cities, counties, and state agencies have procedures in place to explain how to access public records. Contact the Office for assistance in obtaining a copy of a government record.

ACCESS TO YOUR LAND FOR SURVEYS

The Agency is generally required to conduct surveys, studies, tests and examinations to determine which parcels of land are needed and which are suitable to complete the project in a manner that will accomplish the "greatest public good and the least private injury." To do that the Agency will often need access to your property even in the early stages of project consideration. Before doing so, the Agency's surveyors and consultants must give reasonable notice and can only come on the property at reasonable times. If you refuse access, the Agency may apply for and will usually be entitled to a court order permitting the ac-

cess. The Agency will, however, be required to pay for any damages it causes to the property while conducting surveys, tests, and examinations, or will be required to restore the property to its former condition.

REQUIRED APPRAISAL AND NEGOTIATIONS

Before condemnation of your property can commence, negotiations must be undertaken to acquire the property by purchase or exchange. An Agency is required by law to make a reasonable effort to negotiate with you before filing for condemnation. The negotiation process usually begins with the Agency's obtaining an appraisal of your property, including all compensable damage to any property not acquired. You have the right to be informed of the Agency's designated appraiser's inspection of the property and the right to accompany the appraiser during the property inspection. You should take advantage of this opportunity to explain to the appraiser any aspects and characteristics of the property that may have an effect on the property's value. The appraiser may otherwise not become aware of these features. Your comments may well influence the final opinion as to what the fair market value of your property is.

You also have the right to obtain various types of information about the Agency's appraisers, such as their names and addresses. If you would like to see the appraisal and know the valuation the appraisers arrived at, you may request access to that information, filing a written GRAMA request if necessary. If the government denies access to the record, it must identify what documents it will not make available. The government's decision can be appealed under GRAMA. You may also request help in getting access to the appraisal from the Office of the Property Rights Ombudsman. In any event, you will be entitled to see the Agency's appraisal well

before any formal hearing on valuation, whether in mediation, arbitration, or court.

The appraisal process can be very complex, especially if only a portion of your property is acquired by the Agency. Any appraisal must be completed by a Utah State Certified Appraiser. There are many holding this license who are willing to do work in condemnation. The best appraisers to use in eminent domain proceedings are usually those with extensive prior experience and training in such matters. Real estate agents and others generally associated with property are not permitted by law to testify in court about property values. Their opinions may be of some assistance to you, but cannot be used in the formal process of condemnation.

In arriving at just compensation, the appraiser must generally look at as many as six independent factors, depending on what type of property is being acquired, and depending on whether all or just a part of your property is being acquired. These factors include:

1) Land Value. This is the base value of the land that is to be acquired. The appraiser usually estimates this by looking for recent sales of similar property in the vicinity, although other valuation methods may be used. The best comparables are about the same size and shape and have the same use or potential use as your property. Adjustments are made to accommodate differences between your property and the comparables. Land value is generally expressed as a dollar amount per square foot or per acre. Once determined, that unit price is applied mathematically to the size of your property and to the size of the portion of your property that the Agency plans to acquire, if only part of the property is needed.

2) Improvements. Improvements on the property such as landscaping, fences, buildings, etc. generally contribute value to the property, although that is not always the case. If they are in very bad condition they may detract from value. The value of improvements that are affixed to the property or which will be lost because of the proposed acquisition must be separately assessed and paid for by the Agency. The market value of improvements on the property is added to the land value to reach a total value of the property being appraised.

The essential aspect of improvements valuation that must be understood is that the courts have said that the Agency must pay for the amount that the improvements contribute to the overall value of the property, not the replacement cost. “Contributory value” means the difference between the *market value* of the property with the improvements on it and the *market value* of the property without the improvements. If the improvements can be replaced at a cost that is less than the “contributory value,” the Agency will often simply replace the improvements when the project is done, or offer the replacement cost to the property owner so that he or she can do the work.

If the Agency chooses to pay for the lost market value that occurs because the project destroys an improvement, that may be legally sufficient, even though the property owner may attach a much greater value to the landscaping, building, natural features or other amenities that are lost. Sentimental value, for example, is not recoverable. As might be expected, this is an area of compensation that can be quite subjective and where reasonable minds may differ, offering more opportunity for offers and compromises.

3) Severance Damages. If only a portion of a parcel is being acquired, then an analysis must be made by the appraiser to estimate whether the acquisition will result in damage to the value of the property which is not being acquired (known as “the remainder”). Severance damages are generally expressed as the difference between the value of the remaining property in its “after” condition and the value of the remaining property in the “before” condition.

The most common situation where severance damages may occur is when the remaining property no longer has the same function or utility as it had prior to the condemnation. If the remaining parcel has no utility or has lost all market value, the Agency may be required to acquire all of your property, particularly in state highway projects.

Severance damages do not apply when the entire property is acquired under eminent domain. These damages are only due if the property owner keeps a portion of the property, and the project involved substantially lowers the value of that remainder even more than the amounts due for the land taken and the improvements lost. This lowered value may be due to proximity, such as when a widened highway comes very close to a home; from loss of utility, such as when a new curb and gutter eliminate parking spaces; or other adverse effects such as loss of view, loss of access, or exposure to nuisances and hazards.

Severance damages may be due when a property is rendered “nonconforming” and the remaining use is therefore “grandfathered” under the local land use regulations. Nonconforming uses can be severely restricted by local ordinance. Perhaps they cannot be rebuilt if damaged by fire or casualty. Sometimes they cannot be remodeled or

expanded. Be sure that these factors are considered in the analysis of severance damages.

The key is whether the changes created by the project would lower the value of the remainder in the marketplace, not just whether the remaining property is less useful or valuable to the current owner.

4) Offsetting Benefits. In some instances the construction of the public improvement for which a portion of your land was taken enhances the market value of the rest of your property. These “special benefits” must also be valued. Examples might include the addition of curb and gutter, access to utilities, or other benefits. If there are such enhancements, and they add to the value of your remaining property, then these added values must be deducted from any severance damages in the calculation of just compensation.

Even if the project’s positive impact on property value is significant, however, the benefit may only be used to offset severance damages as explained above. Offsetting benefits may not be used to reduce any compensation due for land, improvements, or other damages discussed above.

Remember that each case has to be considered on its own merits in order to make this determination and that it is the marketplace which determines this value, not the preferences of the current owner. Please feel free to call the Office of the Property Rights Ombudsman with questions about your specific situation.

5) Project Damage. Damages to the property arising during the construction may also be compensable, unless

the damages are cured and the property repaired by the Agency or its contractors. If, for example, construction damages the foundation or walls of an adjacent structure, those damages must be compensated. Sometimes the contractor is expected to cover these damages and the Agency will direct any such claims to it. These damages may not be part of the eminent domain process and payment for these claims may not be part of “just compensation.”

Be sure to respect the formalities that must be followed if you have claims that result from negligence, neglect, trespass, construction problems, failed promises and incidental issues that are not essential to the project’s design and construction. Any claim for such injury to property must be filed within a year of the damage and strict notice rules must be followed. If you miss the twelve month deadline, your claim cannot be recovered from a government agency, though you may still be able to pursue a private contractor. The Office of the Property Rights Ombudsman does not assist with all construction damage claims, but the Office can explain the claims process and help you get in touch with the right people to contact.

6) Temporary Use or Occupancy. Often during construction part of the property not actually acquired is “used” by the Agency for construction purposes. This temporary “use” must be compensated for and is assessed much like a fair short term rental would be negotiated. No permanent interest in the property is acquired and the right to use and the obligation to pay for use terminates when construction is completed. At that time, the “used” property returns to the exclusive ownership and use of the landowner.

Usually temporary occupancy compensation is calculated by determining the market value of the land involved and

multiplying that value by an annual percentage rate such as 10% for each year that the land must be used. This payment is in addition to item 5, which includes reimbursement for damages done to the property while it is used by the Agency.

Items which are not generally compensable: All property is unique in its owner's eyes. We all purchase or hold property because it appealed to us more than other properties, based on our particular wants, tastes, and desires. Property values, however, are determined objectively, by market forces, and not subjectively by the unique value it holds to the current owner. Loss of sentimental value, of historic interest, and emotional trauma associated with having to sell property through condemnation are not compensable under the law and may not be considered. It is also not a factor in valuation that the condemnor may have special or unique need or use of the property.

Just compensation is determined by analyzing objectively what a reasonable and well-informed buyer, who is not compelled to buy, would pay to buy the property from a reasonable and well-informed seller, who is not compelled to sell. The price is to be that which would be negotiated under normal market conditions for a cash sale. The proposed use by the Agency cannot influence that price – it cannot increase it, or decrease it — and the valuation is arrived at as if the proposed project for which the property is needed does not yet exist.

Noise, dust, inconvenience and other unavoidable aspects of construction that affect all properties in the area are not considered in determining just compensation. Unless the interference is very unreasonable and of long duration, no

compensation is due for construction inconveniences.

All six of the above issues must be addressed in the appraisal process, when applicable, and you are entitled to know how any offer of compensation addresses each of these items. Any aspect of the project that affects just compensation should be disclosed to the appraiser and he or she must take them into account in arriving at a conclusion as to value.

NEGOTIATION

Once the appraisal is completed and accepted by the Agency, the Agency must offer to you the full accepted appraised value and damages as defined above. You are entitled to receive a written statement showing how that value is established. In most cases, particularly when the property owner is the occupant of a residence involved in the acquisition, the Agency will give you the entire appraisal report. Since appraisals can be very technical, a summary should be provided that explains the data, analysis, and final conclusions of the appraiser.

You are entitled to have time to consider any proposals for compensation, to have those proposals in writing, and to be protected from any coercive or heavy-handed negotiation technique. The Agency cannot commence condemnation proceedings until it has negotiated with you in good faith in an effort to acquire the property without legal action. Proposed construction schedules and demands for occupancy of your property must not interfere with negotiations.

Negotiations require the involvement of both parties. You should reply in a timely manner to any offers made to you.

If you do not respond, your silence may be viewed as a rejection of an offer. The Agency is not bound to negotiate when negotiation is futile or continue to accommodate unreasonable demands by property owners.

Feel free to ask questions in the process of negotiation and to consult with experts, lawyers, appraisers and other people knowledgeable about the process. Find out all you need to know to make an informed decision about whether to accept the proposed just compensation or not. Obviously, it is easier and more convenient to settle without extended negotiations or dispute resolution.

Condemnation proceedings can be expensive and time consuming. A reasonable resolution of any disagreements through negotiation or mediation is usually in everyone's best interest. Remember that negotiations can continue even after the formal arbitration or court process has begun. Many cases are settled just before or even during trial.

You have the right to reject any offer for any reason, or to request more information if you are unable to make a decision due to insufficient facts. The Agency also has the right, after it has determined that good faith negotiations have reached an impasse, to proceed with condemnation and seek resolution in court. At that time you are served with a Summons and Complaint, and the date of valuation of your property is fixed. There will be no compensation paid for any improvements you make to your property after the date that an action is filed.

NOTE: Government entities are unique in American law. Although the agent of a corporation or individual can bind that individual, agents of government rarely do. If

the Agency's negotiator makes representations to you that you rely on to make decisions, make sure that those representations are in writing. All of the essential factors that are part of your decision to accept just compensation should be in any final document you sign with the Agency to convey title or agree to a final resolution. Often an Agency will agree to provide fences, landscaping, or other non-cash incentives as part of a settlement. Make sure these terms are reduced to writing and approved by the governing body of the Agency. Understandings that are not part of these written documents are not likely to be binding and cannot be enforced.

There are times when property owners want enforceable assurances that condemnation will not be used against them in the future. Such covenants are illegal, and are unenforceable as a matter of law. You should not seek, nor accept, such a condition.

GIFTS

Sometimes, usually for tax purposes or to improve the community, property owners may wish to make a "gift" of the property to the government, to waive payment for some compensation that they may otherwise be entitled to, or to sell property for less than market value. This is entirely appropriate and may be useful to you. In state highway projects or other projects supported by federal funds, the Agency must disclose to you the amount of just compensation that would be offered if the property were not given to the government. The Agency must then offer to pay for the property instead of receiving it by gift.

There are some projects however, where funds are limited, that will not be accomplished without private dona-

tions of land. All involved have to decide if the project justifies the gift of land or not. While the project may not be completed if the land is not gifted, that does not justify any coercive tactics to compel you to give. Such demands for property are wholly inappropriate. A gift must be made without duress, misrepresentation, or other abusive tactics.

HARDSHIP ACQUISITIONS

There may also be times when the property owner needs to sell, but the government entity is not ready to buy under normal circumstances. Knowing that the specter of a pending condemnation can chill the market to sell property, some agencies have programs to acquire property from families where a normal delay may work a hardship on them. Sometimes a job transfer, health problems, financial difficulties or other factors make selling property necessary. If this is your situation, discuss the matter with the Agency involved and find out if they have a procedure for hardship acquisition. Under these circumstances, the normal rules of eminent domain may not apply and the transaction is one of negotiation only. The acquisition is probably totally voluntary. The property owner does not have the right to protest the terms or timing of the sale unless the Agency has taken some action that would constitute a breach of a constitutional right by unreasonably delaying condemnation or taking some other inappropriate action.

IF NEGOTIATION FAILS, THE GOVERNMENT CAN FILE LEGAL ACTION

If you and the Agency are unable to reach an agreement based on the appraised value, the Agency will likely

choose to use its power of eminent domain. If the Agency involved in acquiring your property is a school district, city, town, county, special service district, or other unit of local government, the governing body of that entity must hold a public meeting where a decision is to be made whether to condemn your property. You must be notified of the meeting and be allowed to speak. The governing body may also convene a closed meeting to discuss the acquisition. This closed meeting, if held, cannot substitute for the public meeting that also must be held where you will have the opportunity to speak if you wish. State agencies and private companies are not required to adopt a resolution of condemnation.

The condemnation process is commenced with the filing of a Complaint in the local district court, and by serving you with a Summons and copy of the Complaint. The Complaint must identify the parties (the parties include the Agency and you and all others who have an interest in your property, such as the holder of a mortgage or lien on your property) and describe specifically the property to be taken. If less than the entire property is being acquired, the Complaint will include a site drawing showing the “whole property,” the portion being acquired (the “take”) and that which is not being acquired (the “remainder”).

The judicial process in eminent domain is technical and the Agency is required to follow those procedures precisely. Any deviation may result in the condemnation case being dismissed, although it can be, and usually is, re-filed immediately once a defect or omitted procedure is cured.

ATTORNEYS AND ATTORNEYS FEES

If you wonder whether or not you should consult with your

attorney about a pending condemnation, the answer is yes. You need all the information that is available to you about the choices you face, and your attorney will have a perspective you should consider. This does not mean that you are obligated to retain counsel to deal with condemnation negotiations. You may consult along the way and decide at any time to bring your attorney into the process, or consider the advice she has while responding to the process on your own.

Legal fees incurred by the landowner in a condemnation case are generally not recoverable in Utah, even if you prove in court that the condemnation is unjustified and it is dismissed, or if you prove that you are entitled to more compensation than was offered. Generally, you are only entitled to reimbursement for attorney fees if the government abandons an eminent domain action after it is commenced or refuses to pay the just compensation ordered. When any Agency uses federal funds, there are a few more instances where legal fees must be paid by the government, but only in very limited circumstances. You may contact the Office of the Property Rights Ombudsman for more specific details related to your particular circumstances.

Landowners can often negotiate with attorneys to represent them on a contingency fee basis, where the lawyer receives a percentage (sometimes 1/3) of the difference between the amount ultimately obtained for the client and what was offered by the Agency before the lawyer became involved. Some attorneys will also consult with you on an hourly basis and not take a share of the ultimate award of just compensation.

MEDIATION OR ARBITRATION

You do have the right to request that an attempt be made to

resolve the matter through arbitration or mediation instead of through legal action in the court. If you request that the Office of the Property Rights Ombudsman become involved, the Office has standing to request that the judge stop the court proceedings and arrange mediation or arbitration of most condemnation issues. You are entitled to have an attorney represent you in mediation or arbitration, just as you may have legal counsel at trial.

Mediation is a negotiation that involves a neutral third party who works with you and the Agency to arrive at a settlement that both parties agree is fair. Each party remains in control of the outcome.

Arbitration is more formal. An arbitrator may make a decision that resolves the dispute like a judge would make but the process is much more informal than a court proceeding.

The Office of the Property Rights Ombudsman may determine that the matter is not appropriate for mediation or arbitration and decline to request that the court stop the legal action. Usually the legal process takes long enough that arbitration can be completed within the time it takes to schedule a trial.

The Agency may prefer mediation or arbitration and suggest it. But you as property owner need not participate if you do not choose to. On the other hand, if you want to mediate or arbitrate and the Office of the Property Rights Ombudsman determines it to be appropriate, the Agency involved is compelled to participate.

After arbitration, either you or the Agency involved in the case may appeal the resulting decision to court. The court

will rehear the evidence, and may or may not give any deference to the record established at the arbitration. An attorney from the Office of the Property Rights Ombudsman and/or your attorney will attempt to help you make the best decision from your remaining options.

TAKING IMMEDIATE POSSESSION

If the Agency determines that good faith negotiations have reached an impasse, the Agency may attempt to take immediate occupancy of your property so long as you are not displaced by their doing so. If you are to be displaced, they can usually only obtain immediate occupancy after they have given you the required 90-day displacement notice and met the other statutory requirements they must meet prior to taking occupancy. This issue cannot be forced to arbitration, but must be decided in a courtroom unless both parties agree to arbitrate.

The court will consider the value of your property and the damages that may result if immediate occupancy is granted. The Agency must show why the property must be made available quickly. If the court decides in favor of the Agency and grants occupancy, the Agency must immediately deposit into court the full amount of the estimated just compensation.

You may withdraw this money if you wish to. If you withdraw the money, you may still later argue (in a court or arbitration) that you are entitled to more money. You will not be allowed to challenge any other part of the condemnation process (such as the Agency's right to take the property). If you refuse this payment, and leave the money with the court, you reserve the legal right to challenge *any* aspect in a court or arbitration. Thus, if you

wish to preserve all your rights to challenge, you must not withdraw the funds that the Agency has paid into court. If you believe that the only real issue is whether you are owed more money, there is probably no reason not to take the funds. You will not receive interest on the money if you do not take it at the time of occupancy.

As an alternative to legal action, you and the Agency may negotiate a right of occupancy agreement that would avoid the need for filing a motion in court. This is usually a good thing to do, since it avoids the Agency having to file a lawsuit against you. Since both you and the Agency may be better off if no legal action is filed, they may agree to pay you their estimate of just compensation in exchange for the right of occupancy, just as they would have to do if they took the matter to court. An agreement such as this usually includes a waiver of the right to challenge any aspect of the condemnation in court, except for additional compensation. The date of occupancy usually fixes the date that just compensation is to be based upon. Be sure that it is understood that you are entitled to interest on any future funds received as additional just compensation. The Office has prepared a form that can be used to agree to occupancy of the property without limiting your right to receive more money and can explain such agreements to you or to your attorney.

DETERMINATION OF JUST COMPENSATION

According to Utah courts, “just compensation” means that you are to receive fair market value for your property. After formal condemnation proceedings have begun, the arbitrator, jury or judge must hear legal evidence regarding just compensation offered by you and the Agency.

At mediation, arbitration or trial, you are entitled to have a state certified appraiser testify regarding your appropriate compensation. You may have to pay the witness for his or her time, however. In addition, you may testify yourself about your property if you have intimate or special knowledge of its uses and value. By hearing evidence from you and the Agency, all of the factors described in the appraisal process above may be determined by the arbitrator or court.

If you are dissatisfied with an arbitrator's determination of just compensation, you may appeal the matter to district court. If no arbitration is held, the first resolution of the issue of just compensation will be made in the district court. If you are dissatisfied with the district court's decision, whether you arbitrated the issues beforehand or not, you can usually appeal certain aspects of the court's decision to an appellate court.

RELOCATION BENEFITS

In some circumstances, the amount of property acquired means that you may have to move. The Utah Relocation Assistance Act was created to offset some of the hardships associated with having to move from your home, business, or farm. Under the Act, if you are displaced or required to move for the project, you may be eligible for reimbursable relocation costs, which can include actual moving expenses, and certain other costs depending on the type of property being acquired.

Residential. If you are the homeowner and you are displaced from your home, the relocation costs due may include the cost of replacement property if you must pay

more for equivalent property than you received in just compensation. The reimbursable cost of replacement property is determined on several factors as governed by law. In addition to actual, reasonable and necessary moving expenses, relocation costs may also include interest rate penalties and other incidental costs of the move. In addition, the condemning agency will usually pay any transfer taxes, if any, and recording fees.

Whether you own or rent a home, if you are displaced the Agency is also required to offer you a comparable replacement dwelling that is safe and clean and reasonably close to your employment and public services. If one cannot be found for the compensation you received for your former residence, additional sums may be paid to you so that you can find an appropriate home. If you are a renter and cannot find an appropriate rental unit at the same or lesser rent, the Agency may provide you with other assistance, such as, a rental assistance payment.

Small Business or Family Farms. If you must move your small business or family farm, the condemning agency may provide relocation counseling services, which may include assisting you to identify replacement properties available on the private market located within the jurisdiction of the condemning agency. You are usually not required to move from your property until 90 days after receiving written notice that the move is required. Small business and family farms may also be eligible for moving expenses and reestablishment expenses.

If you are not satisfied with the relocation assistance offer, you may ask the Office of the Property Rights Om-

budsman to appoint a mediator or an arbitrator to consider the issue, which it will do after you have attempted to resolve any disagreement using the Agency's appeals procedures. If you are involved in a court action over the condemnation, the court could also consider relocation issues, but this is rare. Condemnation cases are usually limited to just compensation. Relocation issues are handled separately.

Any Agency that displaces the occupants of property under condemnation or the threat of condemnation may adopt rules and regulations explaining the procedures for compensating those who must relocate. If it does not, then it must follow the rules that have been adopted by the Utah Department of Transportation. Ask to see those regulations and call the Agency and/or the Office of the Property Rights Ombudsman with any questions that you may have.

TAX INFORMATION

Your just compensation will sometimes not be considered as income for tax or welfare purposes, but there may be income tax questions if your property has increased in value substantially since you acquired it. The IRS classifies this type of property purchase as an "involuntary conversion". You should contact the IRS and the Utah State Tax Commission to obtain additional tax information if you have questions. Check the IRS website at www.irs.gov for the key words "involuntary conversion."

You are responsible for paying your property taxes. If all of your property is taken, the taxes are usually prorated based on the date of occupancy or the date you

closed the transaction and transferred title. If part of your property is taken, this will sometimes trigger an adjustment to your taxes by the County Assessor. If this does not occur, consider appealing your property valuation next time you are notified of an annual assessment. If your property is being taxed under the Farmland Assessment Act as “Greenbelt Property,” the law requires the Agency to pay any rollback taxes that are due as a result of an acquisition.

Remember that you must provide marketable title to the property being acquired. Sometimes your mortgage document, the deed of trust or other liens and encumbrances recorded on your property provide that creditors are paid the proceeds of condemnation actions instead of the property owners. Check with a title company, your lender, or an attorney about specifics if you have questions.

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

The Office of the Property Rights Ombudsman can advise you about your rights and responsibilities in the event of a condemnation proceeding. The Office includes attorneys employed by the State who are familiar with the law of eminent domain. There is no charge for its services. Its goal is to help you avoid the cost, delays and hassle of legal action. Agencies can also benefit from using mediation and arbitration, thus avoiding costly court action.

While the Office will answer questions when asked by agencies and by property owners, the Office will not actively work to resolve your condemnation matter unless you request that the Office do so. A copy of the Request

for Arbitration/Mediation is available on the Office's website.

INVERSE CONDEMNATION

So far, we have talked about what to do when the government wants to buy your property. If you believe that some government action has substantially affected the use or value of your property and the Agency involved does not wish to pay you for the taking or damaging of your land, you may have a cause of action in "inverse condemnation."

These claims are known as "takings" cases, and more information about takings is found on the Office's website. Violation of constitutional property rights by inappropriate entry onto private property, regulations that go too far in limiting uses, nuisances conducted adjacent to private property by public entities, and other taking issues are beyond the scope of this booklet.

CONCLUSION

This booklet is not intended to describe every issue involved in the acquisition of property for public projects or every right that you may have. If you have further questions concerning the process or your rights, you are urged to contact the condemning Agency, a qualified attorney knowledgeable about condemnation proceedings, or the Office.

DEFINITIONS

Appraisal	The process of estimating fair market value in a property or property interest. This valuation is done by a qualified state-certified appraiser.
Condemnation	The acquisition of private property for a public use, for just compensation. Condemnation is not used until all attempts to reach an agreement have failed. Condemnation actions are brought under the power of eminent domain.
Eminent Domain	The legal process by which the government or private utilities acquire property by condemnation for a public use and pay the property owner just compensation.
Fair Market Value	The sales price that a willing and informed seller and buyer would agree upon within a reasonable time. The price is usually arrived at by an analysis of the values of comparable properties in the area.
Noncompensable Damages	Those damages that are not compensated because they are not specific and peculiar to the property. Loss of use and convenience due to dust, noise, interruption of access, and

other inconveniences are often not compensable because all property owners and residents in the area suffer these effects, whether property was acquired from them for the project or not.

**Just
Compensation**

The price the Agency must pay for property as a result of the eminent domain process. Just compensation is the established fair market value as of the date that is fixed by law that the acquisition became sure. Unless otherwise negotiated, this is the date that a summons was served on all those holding an interest in the property.

**Offer to
Purchase**

A written offer stating the Agency's intention to buy property at a specific price.

**Order of Immediate
Occupancy**

A judicial order giving the Agency the right to use the portion of a property that is necessary for public use.

Property Owner

The person or entity that owns or leases land subject to eminent domain proceedings.

**Right of Occupancy
Agreement**

An agreement entered into by the owner with the Agency, giving the Agency the right to proceed to occupy the project. A right of occupancy agreement can be used as an alternative to the Agency's going to court to obtain an Order of Immediate Occupancy.

**Severance
Damages**

If only part of the property is acquired for a project, and the remainder suffers a net loss of value because of the project (after allowing for the beneficial effect of the project on value), then severance damages are owed to the property owner. Severance damages are calculated by comparing the value of the remainder (as part of the whole property) before the project to its value after the project.

Taking

A legal term used to describe the Agency's acquisition of property through the power of eminent domain, for the public use, and requiring just compensation.

**Uneconomic
Remnant**

The portion of a property owner's property that remains after a taking which is determined to be of little value and utility.

**SOURCES OF LAW
REFERRED TO IN THIS BOOKLET**

Utah Constitution: Article I, Section 22.

Utah Code Annotated:

Eminent Domain:
Sections 78B-6-501 thru 522.

Relocation Assistance:
Sections 57-12-1 thru 14.

Property Acquisition Procedures:
Section 78B-6-505.
Section 57-12-13.

Dispute Resolution—Condemnation:
Section 78B-6-522.

Dispute Resolution—Relocation:
Section 57-12-14.

Property Rights Ombudsman:
Section 13-43-101 through 206.

Federal Rules related to Eminent Domain & Relocation:
49 CFR 24. (49 CFR 24 applies to UDOT, all federally funded projects, and other projects where residents, farms and businesses are displaced and the agency or company that is displacing them has not adopted its own specific rules to regulate the process of relocation.)

These statutes and other information are available via the internet at the Office of the Property Rights Ombudsman home page: <http://propertyrights.utah.gov>.

**HOW TO CONTACT
THE OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

By Mail: Office of the Property Rights Ombudsman
Department of Commerce Administration
160 East 300 South, Second Floor
Salt Lake City, UT 84111

By Phone: (801) 530-6391 in Salt Lake City
1-877-882-4662 - TOLL FREE
(1-877-UTAH OMB) statewide

By Fax: (801) 530-6338

By e-mail: propertyrights@utah.gov

By Internet: <http://propertyrights.utah.gov>



**State of Utah
Department of Commerce**

Office of the Property Rights Ombudsman
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

Mailing Address:
Office of the Property Rights Ombudsman
PO Box 146702
Salt Lake City, UT 84114

801-530-6391
TOLL FREE 1-877-882-4662
(1-877-UTAH OMB)
Fax: 801-530-6338

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